In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Respondents.

Reply Brief in Support of Petition for Certiorari

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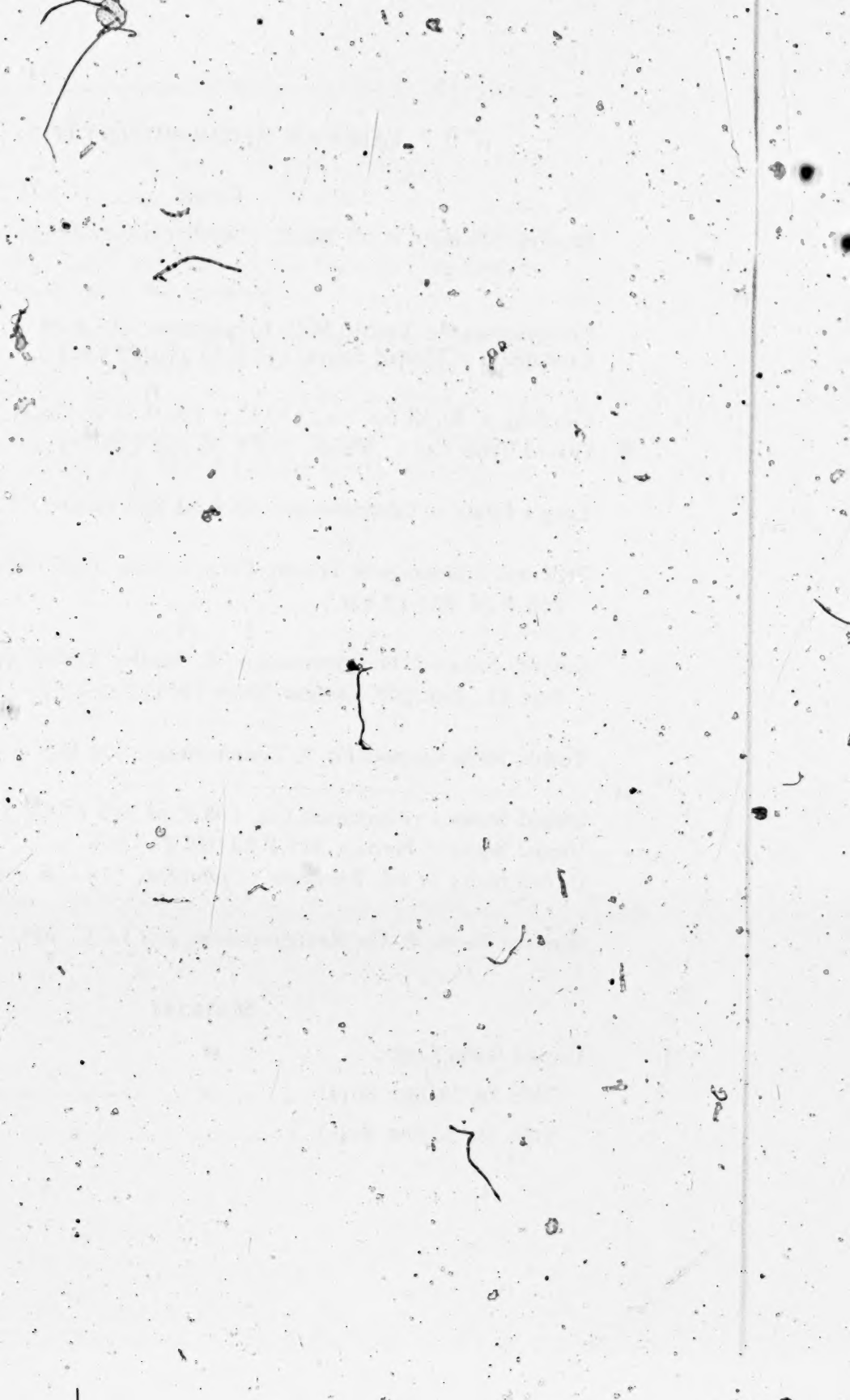

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When the petition for certiorari was filed herein on June 23, 1952, the Court of Appeals had not yet acted upon our petition for leave to file a motion to reinstate a petition for rehearing in banc, which had been stricken on January 30th, by the order of two judges, as unauthorized in law.

On April 19th, we applied for and received from Mr. Justice Douglas an extension to June 27, 1952, in which to petition for certiorari, in order to give the court below an opportunity to pass on the pending petition. But it finally became necessary to file without awaiting action by that court.

Emphasis in quotations is supplied unless otherwise indicated.

Thereafter, on July 9, 1952, recognizing the importance of the question presented, the court did act, all seven active circuit judges participating. The importance of the question was stated thus by the court (R. 2289):

> "On March 10, 1952, the Western Pacific Corporation presented the petition for leave described in the caption. In its supporting brief it asserts that it is its right under the law to have its petition for rehearing considered and acted upon by all the circuit judges. On order of a majority of the circuit judges, the court has been assembled in banc for the purpose of announcing the principles of law and practice it deems applicable in respect of in banc hearings. This course is thought appropriate in order that litigants and the bar may be advised not only of the position taken by the court but of the reasons for it."

With Chief Judge Denman dissenting, the court denied the petition for leave to file the motion. Copies of the majority and dissenting opinions are before this Court in a Supplemental Transcript of Record (R. 2287-2311).

As the dissenting opinion of Chief Judge Denman points out, the court's holding is based on the proposition that the full court is without power to grant or even to consider a petition for rehearing in banc without the prior approval of a majority of the panel which heard the cause.

In part IV below we comment on the decision of July 9th as deciding an important question of judicial administration and doing so in conflict not only with the statute (28 U.S.C. Sec. 46 (c)) but the practice and procedure in the Third and District of Columbia Circuits. Since the court refused to entertain our motion to reinstate the petition for rehearing, the erroneous ruling to which certiorari lies is the order of January 30th. But the opinions of July 9th show the wide importance of the question and the desirability of granting a writ.

First, however, we point out the inadequacies in respondent's brief in opposition to our petition for certiorari. The theory of that brief seems to be that if it can make the issues in a case appear

to be thoroughly confused, so that time and labor will be required for its consideration and disposition, this Court will not entertain the cause.*

We believe respondent to be in error in this view. The issues presented by the petition for certiorari are clear and involve important questions of federal law and procedure as well as important questions of local law. They do not involve questions of fact. Confusion is produced only by respondent's effort to convert, and by the action of the court below in converting, an appellate court into a fact-finding body. That action furnishes the second of the three issues presented by our petition for certiorari. Because an answer to what respondent states on that issue will dispose of its attempt to confuse, we turn to it first.

I.

THE COURT BELOW EXCEEDED ITS APPELLATE OFFICE AND SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION, IN THAT IT FOUND FACTS AB INITIO TO AFFIRM A JUDGMENT WHICH IT HELD TO BE NON-SUSTAINABLE ON THE LEGAL THEORIES APPLIED AND THE FACTS FOUND BY THE TRIAL COURT.

Respondent does not attempt to justify action of an appellate court in finding facts *ab initio* to affirm a judgment which it holds to be non-sustainable on the legal theories applied and the facts found by the Trial Court† (Pet. for Cer., pp. 20-25). It merely asserts that "the findings and conclusion of the District Court were sustained" by the court below (Br. 11) and that the latter made

*For instance, respondent's brief has an Appendix II purporting to give the range of stock quotations of the Western Pacific Railroad Company from 1943 to 1952, although this appears nowhere in the record and has no possible bearing on the issues.

†In addition to cases cited in the petition, cf. L. Hand, J. in *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F.2d 992 (2 Cir.); *Girard Trust Co. v. Windt*, 178 F.2d 359 (2 Cir.); *United States v. Aluminum Co.*, 148 F.2d 416, 433 (2 Cir.); *United States v. Forness*, 125 F.2d 928, 942 (2 Cir.); *Ginsberg v. Royal Ins. Co.*, 179 F.2d 152, 154 (5 Cir.).

no findings of its own and disapproved none of the Trial Court (p. 14). To create an impression that both lower courts decided the case on the same ground, it asserts that both found that plaintiff's claim had no equity (Br. 10, 11, 14), and it notes the Court of Appeals' statement (Br. 11, 14) that "We agree with the principal holding of the trial court * * *." But this "principal holding" was merely the ultimate decision that plaintiff recover nothing. While both courts concluded that equity, i.e., "the law", did not entitle plaintiff to recover, they had totally different views of what the controlling principles of law were and rested on totally different views of the facts.

The Court of Appeals Did Make Findings Ab Initio.

The two courts agreed upon the ultimate decision, but they wholly disagreed upon the grounds of that decision, both factual and legal. This is pointed out by Judge Fee in his dissent (R. 2239-2241, et seq.), and it is perfectly clear from a reading of the decisions. The majority opinion, addressing itself to Judge Fee's objection that it was supplying new findings to support the judgment, did not deny the fact but asserted a power to do so by saying that "findings are not a jurisdictional requirement of appeal which this court may not waive" (R. 2236).

The District Court felt that respondent had defrauded the Treasury* and that a court should not lend its aid to determine who should have the avails of the fraud.† Wholly disagreeing

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*It said, "If I had the power * * * I would order these taxes paid to the United States" (R. 270).

†It stated its main ground of decision as follows:

"To assume * * * that the Congress intended by 23(g)4 to statutorily authorize what was done in this case, is to attribute plain stupidity to the Congress of the United States * * *

"But here the inexplicable occurred. For $4,144,828, the United States released $21,346,567 in taxes upon a basis which is completely incomprehensible. The tax 'escape' invites a type of scrutiny which this Court is powerless to give it.

"Obviously the Court cannot pass judgment upon the validity of the tax compromise and settlement. It is now closed. It is final and

with this view, the Court of Appeals, by a two-to-one decision, held that the former parent had a fiduciary duty to join in a consolidated return and give its former subsidiary the benefit of its tax loss of $17 million without any consideration whatever.

Respondent asserts that no problem of findings was raised in the Court of Appeals, since we assigned no error for failure to find, and our opening brief stated that "the facts * * * are not in dispute" (Br. 14, 15). The facts which in our submission require judgment for plaintiff are not in dispute; the facts found by the Trial Court require such judgment. The vice of the Court

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cannot be reopened except for fraud. [R. 270]

* * * * * * * *

"Perhaps it may be said that it is impertinent for the Court to concern itself with a closed tax transaction and agreement such as this. But if equity principles are our guide, then this tax settlement is of the web and woof of the issue to be decided. Equity has no precise boundaries, and certainly not in this unique controversy.

"* * * this so-called 'saving' is inextricably entwined with the equities. Its very nature shapes and molds these equities. It is a 'pot of honey equally attractive to principals and advocates.' When equity is invoked to divide or distribute the 'pot', it cannot be blindfolded as to the origin or nature of the 'honey'.

"* * * in my opinion, the tax escape was erroneous and unjust. It cannot be cured by committing the further inequity of distributing the gain thus made to others.

"Debtor having made good its 'escape', now comes plaintiff and prays for a share, if not all, of that which 'escaped'. Whether there was, or was not, 'duality of control' respecting the directorates of the two companies, appears to me to be not too important. True, there is a preponderance of the evidence in favor of the plaintiff's contention of 'duality of control'. Be that as it may, I am compelled to rest decision upon the fundamental issue of the justice and equity of plaintiff's right, if any, to be paid for that which was escaped. Analytically speaking, what the plaintiff seeks is to collect from the defendant an amount equal to all, or a substantial part of, taxes that the debtor did not pay to the United States." (pp. 271, 272)

The Court of Appeals disagreed with this whole line of reasoning (R. 2227, 2228).

Contrary to respondent's assertion, the theory that the Treasury should not have permitted tax savings was not dictum; it is the fundamental ground of one of the two reasons on which the District Court concluded that there was no equity in the cause. It is erroneous not only for the reason stated by the Court of Appeals, but also, as noted in the opinion of Judge Fee, because it left the proceeds with the "active wrongdoer" (R. 2240, and fn. 4 on 2250).

of Appeal's decision is that, advancing an entirely different theory of law under which a new range of facts became material, it then proceeded to find them for itself and found them inconsistently with the facts as determined by the trial court or as it made clear it would have determined them.

Respondent's Statement of the Case Shows That the Court of Appeals Made Findings.

Respondent's own statement of the case belies its claim that the Court of Appeals made no findings, since its characteristic feature is the assertion, as fact, of matters which are so declared by the Court of Appeals but were either not found upon by the trial court at all or are contrary to what it did find; e.g., assertions about past practice (Br. 4, 5), and statements that the tax transactions were handled in the ordinary course of business (Br. 6), that the tax savings were not accomplished by respondent's taking over and managing petitioner's affairs (Br. 7), and that respondent did not dominate and control petitioner for its own benefit. The District Court explicitly refrained from finding on the issue of domination because it considered is to be irrelevant on its theory of the law. Yet it made it clear that, if material, it would have found such control, domination and taking over.

Respondent asserts (Br. 29) that

> "The District Court recognized the fact of dual relations but concluded that 'The so-called "duality of control" much discussed and emphasized, is not important in resolving the tendered issue' (R. 274). The Court of Appeals expressly approved (R. 2235)."

But the two courts were not saying the same thing. The Trial Court said that, if it were material, it would find "duality" and that by "duality" it meant that respondent controlled petitioner's board of directors and by reason of that control caused the consolidated returns to be filed for its own benefit (Pet. 21). The Court of Appeals, on the other hand, held the fact to be relevant and found that there was no domination and control.

The issue presented to this Court is not which fact is true but whether a Court of Appeals has a right to make such findings.

Respondent's further assertion (Br. 29) that petitioner "has no standing to exploit the domination theory in view of its expressed denials of all allegations of 'domination and control' by its answer to the Complaint in Intervention in this cause," is without any justification. Subsequent to that answer, petitioner filed a supplemental bill of complaint (R. 208) in which it alleged such domination and control for respondent's benefit and in entire disregard of petitioner's rights. As the opinion of the Trial Court pointed out, in the supplemental bill, petitioner "further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of defendant" (R. 264). This position was maintained throughout the trial and afterwards. In the light of this record, respondent's assertion is not only without merit; it is inexplicable.

II.

RESPONDENT SEEKS TO INJECT A FALSE ISSUE, I.E., WHETHER PETITIONER'S CLAIM IS BARRED BECAUSE NOT PRESENTED TO THE BANKRUPTCY COURT IN THE REORGANIZATION PROCEEDINGS.

Respondent also seeks to introduce a false issue by suggesting that petitioner's rights were cut off, even though valid, because not presented to the Bankruptcy Court in respondent's reorganization proceedings.

This defense was strenuously urged in both courts below, but it was adopted by neither. Each held for respondent on different grounds and it is no answer to a petition for certiorari to argue that the particular judgment might be supported on a wholly different basis not stated.

Only one judge even adverted to respondent's contention, Judge Fee, and he did so to state that it had no merit (R. 2240-2241). That this is so is shown by the following:

First, petitioner's claim arose after the revesting of the assets in respondent and the trustees' surrender to it of the property in December, 1944 (R. 2215). The claim for refund of 1942 taxes, as well as the 1944 tax return, was filed thereafter (R. 2217). The trustees had nothing to do with either. Respondent argues that the income to which the returns pertained accrued while the railroad was being operated by the trustees. But respondent assumed the obligation to pay the taxes on that income by an "Assumption Agreement" (R. 1711-1713), required of it under the revesting order (R. 36, 40, 76). The liability thereafter remaining was respondent's, not the trustees'. It was the reorganized respondent, not the trustees, who then utilized petitioner's loss and rights to avoid paying taxes and to discharge that liability.

As respects the 1943 taxes, as well as those just mentioned, a claim for an accounting of the tax savings could not accrue before there were tax savings, i.e., before August, 1947, when the Treasury accepted the returns pursuant to a settlement wholly negotiated and effected by respondent after it emerged from the reorganization, as the Trial Court found (R. 262, 468; Resp. Br. 6).

Even if it could be said that the trustees had become liable to petitioner upon the filing of the consolidated returns for 1943, respondent assumed that liability by the Assumption Agreement. The revesting order discharged various liabilities but excepted those which it directed to be assumed, and pursuant thereto respondent executed an assumption agreement in which it agreed to

> "2. *Assume* any and all outstanding current liabilities and obligations incurred by said Trustees * * * and *generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business*, including liabilities and obligations hereafter arising up to midnight December 31, 1944." (R. 1711, 1713.)

Evidently respondent does not apply the same argument to the claim of its tax counsel. They were employed by the trustees.

rendered services to the trustees, presented no claim in bankruptcy, yet were paid $300,000 by respondent for their services in conceiving and consummating the tax saving (R. 1749).

Second, respondent succeeded to and now possesses intact the $10,000,000 funded reserve of which most had been set aside by the Trustees to discharge the taxes in question and which later, after the taxes were discharged by the use of petitioner's loss, was set aside by respondent to pay any judgment in this action.

Third, it is ungenerous as well as unfounded to suggest that the Bankruptcy Court did not intend that the trustees should meet any just obligations incurred by them.

Respondent Is the Same Corporate Entity That Went Into Bankruptcy, but Its Former Stockholders Were Completely Wiped Out.

Respondent seeks to distinguish between the "prereorganization The Western Pacific Railroad Company", the "reorganized The Western Pacific Railroad Company" and the trustees during the reorganization. This effort, coupled with its assertions that the taxes accrued while respondent was in bankruptcy and were not incurred by it, that the filing of consolidated returns was in accord with past practice, and that petitioner's interest in respondent was cut off at the outset of the bankruptcy in 1935, is in part immaterial and in part contradictory.

Respondent is the same corporate entity for whose stock petitioner paid $76 million. The assets taken over by the trustees in 1935 were revested in the same corporate entity in December, 1944. The difference is that the capital stock was owned by different people after the reorganization than before. Respondent emerged from the reorganization entirely shed of petitioner's stock interest which was wiped out by the Reorganization Plan. From the moment respondent went into bankruptcy, petitioner lost all control over and interest in it. During all the time involved in these tax returns, petitioner and respondent were complete economic strangers, and petitioner had no control whatever over respondent.

That being so, and the relationship of parent and subsidiary which formerly existed having been completely and permanently severed, how unjustifiable it is to contend (1) that former income tax procedures when the parties were still parent and subsidiary is of the slightest materiality,* and (2) that the former parent, stripped of its control and all economic interest, could be under any fiduciary duty to give away to a total stranger the sole remaining asset of its stockholders who had lost their $76 million investment.

III.

ON THE SUBSTANTIVE QUESTION WHETHER A FORMER PARENT CORPORATION MUST JOIN IN CONSOLIDATED FEDERAL TAX RETURNS WITH A FORMER SUBSIDIARY SO THAT LOSSES OF THE FORMER MAY BE USED TO EXTINGUISH THE TAX LIABILITIES OF THE LATTER WITHOUT ACCOUNTING FOR THE BENEFIT THUS RECEIVED.

On the important substantive issue, respondent's arguments may be reduced to two: (a) that no federal question is involved (Br. 12, 15) and (b) that the court below laid down no general rule but decided the case on particular equities (Br. 12, 13, 15). Neither contention is sound.

There Is an Important Federal Question.

It is little short of amazing to assert that a judgment determining the legal consequences attaching to the filing of consolidated tax returns under federal tax laws raises no question of federal concern. If that is not a federal question, it is certainly a novel and important question of equity jurisprudence and of local law arising in an exclusively federal context and is equally within this Court's certiorari jurisdiction.

In fact, it is a federal question, and it would be a perversion of the tax laws to rule, as the court below did, that the mere fact of

*The trial judge considered it not to be material. He said, "I just don't see the point of what any affiliated company has done in the past as a matter of practice in these returns * * *. What we have in this case is not concerned with that" (R. 1377).

past affiliation gives former subsidiary corporations a right to appropriate their former parent's tax credits to extinguish their tax liabilities.

Like its competitor railroads, the Southern Pacific and the Santa Fe, respondent was expected to pay federal taxes on its war-swollen traffic. There is no reason in public policy why this railroad, emerging from bankruptcy, should not pay taxes like any other. When the Interstate Commerce Commission approved the Reorganization Plan, it provided that respondent should pay its taxes (233 I.C.C. at 455). The Bankruptcy Court's "revesting order" provided that it should do so (R. 36, 40). The amendment to the Revenue Act which first permitted the use of petitioner's stock loss to achieve the tax savings here involved was enacted after the Reorganization Plan was promulgated. The only reason of public policy that excused respondent from paying its taxes was that petitioner's stockholders had lost $76 million and the resulting tax remission was to ameliorate that loss.

Had the parties filed consolidated returns and paid the taxes before tax counsel had discovered the utility of petitioner's loss, and if claims for refund had then been filed based on the use of that loss,* the refund would have come, under the tax laws, to petitioner, and it would now be in possession of the $17 million. The result cannot be different merely because petitioner's credit was utilized when the returns were first filed.

Respondent attempts to answer the argument that Congress intended tax benefits arising from losses to ameliorate those losses, by its prejudiced assertion that Congress did not intend to confer special benefits on holding companies (Br. 16, 17). Congress intended precisely that, for none but a parent company could suffer the loss that Congress made allowable. However, Congress certainly did not intend, when it granted the loss allowance to the parent, to confer windfall benefits on one-time subsidiaries. The Congressional purpose in allowing consolidated returns was

*This was in fact done for 1942, and the parties stipulated and the Trial Court considered that the refund had been allowed in part (R. 163, 169).

similarly to recognize an economic unity and thereby to ameliorate the losses of the party economically suffering them, again the parent and not the subsidiary.

Neither does respondent answer petitioner's claim when it deprecates "the sort of bargaining about tax losses which is demanded here" (Br. 25). That principle applies to arrangements made to prevent the accrual of taxes. It has no application to respondent's efforts to evade the debt it incurred when it used petitioner's property right to discharge its own tax liability.

The Court of Appeals Laid Down a General Principle Concerning the Duty of Affiliates to Give Tax Credits to Each Other.

Respondent's next major argument is that the court laid down no general principle concerning the obligation of one affiliate to join in consolidated returns with another and to confer upon it, gratis, the tax advantage of its losses. It asserts that the court's decision that it was the former parent's duty to join in the returns was rested on the special equities of the case (Br. 12, 13, 15). In truth, the court laid down a sweeping rule as to the obligation of any affiliate, having a loss, to another, having income, regardless of which was subsidiary or parent. For example, respondent proffers as one of the special equities that petitioner had been respondent's stockholder and that respondent's creditors received less than full payment of their debts in the reorganization. But no such consideration entered into the court's decision. On the contrary, it said that if respondent had the loss and the petitioner the gain, petitioner could have compelled respondent to join in consolidated returns and to confer the benefit upon it (R. 2233).

Nor does the circumstance that respondent's creditors were not paid in full constitute any special equity against petitioner. Creditors of a reorganized company, after wholly supplanting the former shareholders as they did here, no matter under what sanction of law, have no right to appropriate still other property of the former shareholders. The reorganized respondent certainly could not have with impunity seized $17 million cash of

petitioner to pay its taxes, merely because the prereorganization creditors had not been paid in full.

In asking that the benefit of the tax savings be adjudged to belong to it, petitioner does not remotely seek something in the nature of equity or value for its former stock ownership. It accepts in full the consequences of the plan of reorganization. The plan was drastic and wiped out the entire stock ownership of the old stockholders. But its consummation, having stripped petitioner of that ownership, left it with something in its place—a huge loss which had a tax utility. It was then that respondent went beyond the plan and seized what petitioner had left. Respondent emerged from the reorganization with a just obligation to pay its taxes and with more than ample funds to do so. If petitioner is denied recovery, the new owners of respondent will not only have taken ownership of the company from petitioner, as the plan contemplated, thereby inflicting a $75 million loss, but they will also have taken from petitioner, now an economic stranger impoverished for respondent's benefit, petitioner's tax credits to enrich their position by an additional $17 million.

How absurd and how unmoral to contend that because an unfortunate corporation has lost its total investment in its subsidiary the bankruptcy laws, after completely wiping out that investment, intended further stripping of the unfortunate owner of its sole remaining asset.

Rights Do Not Depend Upon the Owner's Ability to Employ Them.

Little need be said of the other alleged "special equities." One of them, the so-called past practice, has already been discussed. The major one on which respondent relies is that petitioner has no rights because it was not harmed, "it had no use for its tax credit"—directly contrary to the decision of the Fifth Circuit in banc in the Shreveport Bank Cases (see Pet. for Cer., 18). It is strange doctrine that one may be despoiled of his rights simply because he has no use for them. Those rights were

worth $17 million to respondent, to pay its taxes, as valuable to it as $17 million in gold. They were so valuable that respondent was happy to pay a $300,000 fee to its tax counsel, who discovered their value and used them. Petitioner's right was property to the extent that it was usable and used for respondent's benefit.

The "paradox" in the case arises from the fact that petitioner is poor and has no funds, that its officers and the majority of its directors were in the pay of respondent and did its bidding, and that respondent, emerging from bankruptcy as a prosperous railroad enjoying war time earnings, escaped the payment of taxes because it appropriated its former parent's sole remaining asset.

If petitioner were a wealthy corporation, one could not even conceive of respondent appropriating its tax credit and paying nothing for it. Petitioner's rights cannot depend on its wealth.

IV.

IT WAS ERROR TO DENY PETITIONER A RIGHT TO PETITION FOR REHEARING IN BANC.

The Court of Appeals' July 9th opinion, after noting the importance of the question of rehearings in banc, makes clear that "in the exercise of *its uncontrolled discretion* the court has declined altogether to entertain petitions of litigants for such hearings" (R. 2295). "From this time forward," it concludes,

> "petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing." (R. 2296)

The issue is not whether a rehearing in banc should be granted in a particular case, nor yet what criteria a Court of Appeals may validly establish by rule to govern the granting of such rehearings. The issue is more fundamental. It is whether the court has the power to grant a rehearing in banc and whether the litigant has the right to gain the court's ear in order to call its attention to considerations that should impel it to grant such a hearing. The Ninth Circuit answers "no" to both questions.

The Ninth Circuit Holds That a Court of Appeals Has No Power to Grant a Rehearing In Banc Unless the Three-Judge Panel Approves.

The court below assigns two reasons for refusing to entertain petitions for rehearing in banc.

The first reason given is that once a case has been assigned to a panel of three judges, it belongs to them, and that it would be an act of intrusion for the remainder of the court to participate, unless at least two of the three judges should vote to relinquish the case to the whole court. Referring to the provision of 28 U.S.C. Sec. 46(a) that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs," it asserts (R. 2294) that

> "If regard be had for this mandate circuit judges *may not intrude themselves,* or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit"

and after assignment to a division,

> "If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals."

Again, it states (R. 2294):

> "A petition for rehearing in any such case [i.e., one assigned to and decided by a panel of three] whatever its form or wording, *must necessarily be treated as addressed to* and is solely for disposition by the court or division to which the case was assigned for determination."

This reasoning is equivalent to a statement that a three-judge panel, once constituted, is the court, and the other circuit judges are powerless to take over the cause even should they feel inclined to do so.

Direct Conflict With the Statute.

Thus the court below recognizes that it has the power to direct a hearing in banc but reasons that the power is lost by an assign-

ment to a panel and that the court has no power to grant a rehearing in banc unless the panel approves.

This is contrary to the statute. 28 U.S.C. Sec. 46(c) provides:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing *or rehearing before the court in banc* is ordered by a majority of the circuit judges of the circuit who are in active service."

The statute draws no distinction between the power to order a hearing in banc and the power to order a rehearing in banc.

Conflict With the District of Columbia and Third Circuits.

We have quoted the statement by the court below that a petition for rehearing in a case decided by a panel must necessarily be treated as addressed to that panel alone and subject to its sole disposition.

Contrast this with the views of the District of Columbia Circuit. They are shown by this Court's records in *Charles Sawyer, Secretary of Commerce v. R. Stanley Dollar, et al.*, No. 247, October Term 1951. There the Attorney General of the United States filed a motion addressed to the whole Court of Appeals for a hearing in banc, stating, "This motion is made pursuant to 28 U.S.C. (Sup. II) 46(c)." (No. 247, Oct. 1951 Term, R. 52.) Judge Clark, presiding, responded that the statute

> "* * * allows you to file a motion for rehearing before the Court en banc, at which time the full court passes upon it." (No. 247, Oct. 1951 Term, R. 61)

The panel then presented the motion to the whole court and later announced,

> "The motion for hearing in banc has been considered by the full Court, and denied" (No. 247, Oct. 1951 Term, R. 62).

We are advised that the same practice obtains in the Third Circuit.

The Ninth Circuit Apparently Retains the Views This Court Disapproved in 1941.

The problem is the identical one, and again there is the identical conflict between the Ninth Circuit, on the one side, and the Third Circuit, which led this Court to grant certiorari in *Textile Mills Corporation v. Commissioner,* 314 U.S. 326. The problem was there stated to be

> "whether a Circuit Court of Appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc*",

and this Court stated that

> "We granted the petition for certiorari because of the public importance of the * * * problem and the contrariety of the views of the court below * * * and the judges of the Circuit Court of Appeals for the Ninth Circuit (*Lang's Estate v. Commissioner,* 97 F.2d 867) as respects its solution."

The reasons assigned by the court below for refusing to entertain petitions for hearing in banc are the same reasons why the same court held in 1938 in *Lang's Estate v. Commissioner,* 97 F. 2d 867, that a Court of Appeals lacked power to sit in banc. Although this Court, in *Textile Mills Corporation v. Commissioner,* 314 U. S. 326, held the Ninth Circuit to be in error, and although Congress thereafter enacted 28 U.S.C. Section 46(c) to eliminate any basis for the reasoning that prompted the action of the Ninth Circuit, that court appears to adhere to its original position.*

In *Lang's Estate v. Commissioner,* the Ninth Circuit reasoned that a court had no power to sit in banc because

> "Any other interpretation of the legislation would lead to grave difficulties of administration. If, because there are four or six circuit judges in a circuit, a four or six-judge court were deemed created by Congress, *then each judge may well*

*In *Lang's Estate v. Commissioner, supra,* Judge Denman, now Chief Judge, wrote the opinion, but as shown by his dissenting opinion of July 9th in this cause, he now gives full effect to this Court's reasoning in the *Textile Mills* case and to the policy expressed by Congress in 1948.

have the right and the duty to demand his place in the hearing on each appeal." (p. 870)

Since this Court thereafter held, and Congress declared, that there is power to sit in banc, it would follow, on the Ninth Circuit's own reasoning of 1938, that the other judges do have a right, and in a proper case the duty, to sit. Yet the court now fails to follow the logic of its own prior statements.

This Court in *Textile Mills Corporation v. Commissioner,* 314 U. S. 326, agreeing with the Third Circuit,* said of the view of the Ninth, that it "would not only produce a most awkward situation; it would on *all* matters disenfranchise some circuit judges," [Italics are the court's] and that it would "imply that Congress prohibited some circuit judges from participation in the most important function of the 'court' (the hearing and decision of appeals)" (p. 333).

Despite this Court's decision in the *Textile Mills* case, and despite its later order to the Ninth Circuit in *United States ex rel Robinson v. Johnston,* 316 U.S. 649, to permit a petition for a hearing before the court in banc, the Ninth Circuit appears to have remained fixed in its view that a case becomes the exclusive jurisdiction of a particular panel of three judges once it has been assigned to them. For example, in 1943, dissenting in *Crutchfield v. United States,* 142 F.2d 170, Judge Denman stated:

> "The senior circuit judge still refuses to convene the court en banc *even to consider* the question of the jurisdiction of the court en banc to take over a case pending before three judges, in which judgment has been rendered by two judges

*In *Commissioner v. Textile Mills Corporation,* 117 F.2d 63, the Third Circuit disagreed with the Ninth Circuit, stating (p. 71):

> "Common sense and sound practice dictate that the five judges of this court should be in a position to decide the principles of law and practice to which the court is to be committed."
>
> "The whole cannot be less than the sum of its parts. To hold otherwise is not merely to affirm a plain contradiction in terms, but is also to destroy the authority of the court as a court and to open the way to possible confusion and conflict among its personnel and in its procedure and decisions." (p. 70)

of a three-judge panel, either on the petition of the litigant or myself, a dissenting judge of the three-judge panel.

"* * * As I understand it, the ground of the senior circuit judge's refusal is that once the three judges so assigned by the whole court to consider the case have rendered judgment, though the judgment is not the final action of the court and the case is still before the court during the period for rehearing, only the setting aside of the judgment by two or more of the three judges participating in the decision permits a petition for a rehearing en banc. That is to say, that the seven judges have resigned to two judges selected by the seven the jurisdiction to prevent a rehearing by the seven of a decision of the two not yet final." (Italics are in the original) (p. 180)

This statement made in 1943 would seem to describe the majority opinion of July 9, 1952.

The Judges of the Ninth Circuit Appear to Have Three Different Views.

In *Bradley Mining Co. v. Boice*, decided by the Ninth Circuit on August 27, 1952, Circuit Judge Pope, dissenting from an order of a panel denying a petition for rehearing in banc, stated that he disagreed with Judge Denman's interpretation of the court's decision of July 9th in the present case, which appears at R. 2296, 2297. Judge Pope thought that the full court could grant a rehearing in banc but that a litigant was not entitled to petition for such action; he believed that Judge Denman had misinterpreted the court's decision as holding that the full court lacked all power unless the panel first relinquished the cause to it. A copy of the opinions in *Bradley Mining Co. v. Boice* is attached hereto as an appendix.

Judge Pope's construction of the July 9th opinion runs counter, we submit, to the declarations in that opinion that "circuit judges may not intrude themselves * * * upon a court or division", that if the panel, or a majority of it, denies a petition for rehearing "that ends the matter", and a petition must "necessarily be treated as addressed to and is solely for disposition" by the panel.

Judge Pope's expressions in the *Bradley* case are significant as indicating that there are at least three views on the subject among the judges of the court below.

Apprehension That the Court Would Be Overburdened Should Not Result in Denial of All Right to a Litigant to Petition For a Rehearing In Banc.

The second ground stated in the opinion of July 9th for holding that petitions for rehearing in banc should not be permitted is that a contrary holding would burden the court with overwork and "completely nullify the prime statutory objective of effecting a division of the court's work" (R. 2295). But this is the same reasoning stated by the same court in *Lang's Estate v. Commissioner*, 97 F.2d 867. There, the court had said:

> "More important still, it would increase so greatly the amount of work of each individual judge that it would cause again the arrearages which the additional judges have been created to remove." (p. 870)

We do not mean to depreciate the matter of overwork. But we think it a fair submission that the apprehension should not lead to a total denial to litigants of the right of petition.

Neither the District of Columbia Circuit nor the Third Circuit finds that recognition of the litigant's right produces an intolerable burden. The Third Circuit, like the Ninth, has 7 judges, and the District of Columbia has 9.

In many cases no petitions for rehearing are filed at all. In still fewer are requests made for a rehearing in banc. Not only is the federal bar not inclined to waste time and effort, but it does possess self-restraint and a sense of professional obligation to the court. Rules of practice should not be created on the premise that the bar does not.

A petition for rehearing in banc was here filed because of the unusual combination of factors: (a) the case involved important and novel questions of law, (b) the panel had consisted of but one circuit judge and two district judges, (c) although the ma-

jority affirmed the decision of the District Court, it disapproved the District Court's reasoning and decided the cause on a wholly different ground, (d) no Circuit Judge wrote a line on the merits, and each of the three District Judges participating expressed an entirely different view of the law. The appropriateness of a rehearing in banc was indicated by the request of one of the three-judge panel that it be granted. Before such a cause should be presented to this Court upon petition for certiorari, it seemed proper that it should be brought to the notice of the entire Court of Appeals.

The art of the law is discrimination. No doubt petitions for rehearing in banc will not often be granted, and overwork may be a proper factor to consider in deciding whether to grant a petition in a particular cause. But we cannot believe that it is a logical basis for denying all right to file such petitions.

Courts are made for litigants, not litigants for the courts. The device of having an appellate court sit in divisions is but the equivalent of having a number of coordinate intermediate appellate courts answerable to another superior to them. Both devices are in common use throughout the country, and the propriety and necessity of permitting a petition to the whole court, where it sits in divisions, or to the higher court, is not only obvious, but the practice is widespread.* The certiorari jurisdiction of this Court is an example.

Unless petitions for rehearing in banc are recognized, there would be in the Ninth Circuit not one Court of Appeals but a multiplicity of them. Chief Judge Denman speaks of three panels, but in fact seven judges can be constituted into 35 different panels of three. Where District Judges sit on the Court of Appeals, as was the case here, there could be a much greater number of panels, increasing greatly the opportunity for divergent views between different panels. If there is to be an opportunity to review their decisions, there must be a right to petition for rehearing in banc

*As we are informed, in California, where there are 8 intermediate appellate courts, at least half their decisions are followed by a petition for hearing in the State Supreme Court.

unless the burden is to fall on this Court in its certiorari jurisdiction. If there is a burden on courts by reason of the quantity of litigation, it cannot be escaped. It can merely be passed from Courts of Appeals to the Supreme Court.

No Study of Long Records Should Be Required, In Passing on a Petition For Rehearing In Banc, If the Court of Appeals Confines Itself To Its Proper Appellate Office.

In *Bradley Mining Co. v. Boise,* Judge Pope explained his concurrence in the July 9th opinion on the ground that a judge should not be expected, and that the statute should not be construed as requiring him, to read long records in cases in which he has not sat in the original hearing. But a reading of a whole record should not ordinarily be necessary to pass on a petition for rehearing in banc, any more than to pass on a petition for certiorari, since the question presented is not the final decision but merely the desirability of consideration by the court. That ordinarily should turn on the kind of issues presented, not the evidence. An examination of such petitions for rehearing in banc as are filed should usually suffice to show whether they are worthy of more careful consideration. Appropriate screening rules could be adopted.*

The instant case is a good illustration. The face of the majority opinion on the merits (R. 2214, et seq.) showed that it announced a sweeping rule of law. No delving into the record was necessary to appraise the importance of that legal issue. It also showed that the majority was usurping the office of the District Court in making findings. No exploration of the record was necessary to determine the facts, because the issue was whether the Court of Appeals should or could find facts at all. No brief in opposition to the petition for rehearing was filed, so that no statement of fact was challenged. The desirability of granting a rehearing in banc was determinable on the face of the petition and the majority and dissenting opinions.

*For example, as suggested by Chief Judge Denman (R. 2307), a court might adopt a rule that a petition for rehearing in banc would not be granted unless at least one of the judges on the panel so voted.

Since a Court of Appeals Has Power to Grant a Rehearing In Banc, the Litigant Should Not Be Denied the Right of Petition.

The ground stated by Judge Pope in *Bradley Mining Co. v. Boice* for concurring in the July 9th opinion herein is that, while the court may grant a rehearing in banc, a litigant has no right to request it. This view, we submit, is not supportable. A litigant must have the right to request a court to exercise a power which it possesses and to grant the kind of relief which the law empowers it to grant. The question is not, as stated in the opinion of July 9th, whether a court may "be compelled on the petition of a losing party" to sit in banc, but whether the litigant may request the judges to do so, if they think it warranted in the particular cause.

Chief Judge Denman's dissenting opinion denominated the denial of any right to petition as "shabby treatment of the litigant" (R. 2302). The majority opinion itself uses the term "uncontrolled discretion". Whatever the characterization, and either is enough to give one pause, it would appear that to deny a litigant the right to petition a court to exercise its power is arbitrary, and our system of jurisprudence looks with disfavor on arbitrary and uncontrolled power.

Supplemental Opinion of Chief Judge Denman.

On September 11, 1952, Chief Judge Denman filed a supplement to his dissenting opinion of July 9th. A supplemental record containing it will go forward to this Court. In it he quotes a letter to him from Chief Judge Stephens of the Court of Appeals for the District of Columbia Circuit. Judge Stephens states that in his court any party to a case may, by motion or petition, request that a rehearing be held in banc and that such motion or petition is submitted to and ruled upon by all the active Circuit Judges. He also lists a number of cases where rehearings in banc have been ordered, including several ordered on the petition of one of the parties.

CONCLUSION

We respectfully submit that the petition for certiorari should be granted.

Dated: San Francisco, California
September 12, 1952.

HERMAN PHLEGER
MOSES LASKY
FRANK C. NICODEMUS, JR.
NORRIS DARRELL
Attorneys for Petitioners

(Appendix follows)

APPENDIX

United States Court of Appeals
for the Ninth Circuit.

BRADLEY MINING CO., a corporation, *Appellant,* vs. EDWARD H. BOICE, *Appellee.*	No. 12,684 Aug. 27, 1952

Before: HEALY, BONE, and POPE, Circuit Judges

PER CURIAM

In this case we affirmed a judgment against the appellant, one member of the court dissenting. 194 F.2d 80. Appellant petitioned for a rehearing in banc, and rehearing was denied. Application for certiorari followed and was denied. 343 U.S. 941. Upon the coming down of the mandate appellant moved for leave to file a motion to vacate the denial of its petition for rehearing in banc and for the reinstatement of its petition. That motion is the matter before us for disposal.

The case was not in any aspect of such character as to suggest the advisability of its being heard or reheard in banc. It involved purely factual issues. Depending upon how the jury might evaluate the evidence, or how appraise the credibility of the witnesses, it was concededly a case in which both actual and exemplary damages were awardable. The charges made against the defendant, and presumably accepted by the jury as true on the evidence before it, were for conduct of a nature calculated to blast at the threshold the efforts of a young doctor to establish himself in his profession. The problem presented bore scant resemblance to Southern Pacific Co. v. Guthrie, 186 F.2d 926, and speculation as

to the probable attitude here of the judges who participated in *Guthrie* has no perceivable basis.

The judge who presided at the trial, convinced that the jury was not motivated by passion or prejudice and that its verdict, while large, was not excessive, denied a motion for a new trial.* Being ourselves disinclined to usurp the functions of the jury or to invade the province of the district judge, and being, moreover, of opinion that the judge was right in refusing to disturb the verdict, we affirmed. Appellant has had its appeal and its opportunity for certiorari or other relief in the Supreme Court. It is not entitled to pursue the process a second time.

The motion for leave to file is denied.

POPE, Circuit Judge, dissenting.

I think that a just disposition of this case requires that the appellant be granted an opportunity to reargue the case before the court sitting in banc.

In a recent opinion of this court in banc in Western Pacific Railroad Corporation, et al., appellants, v. Western Pacific Railroad Company, et al., appellees, No. 12506, handed down July 9, 1952, the court, after denying the right of a defeated litigant to require all of the judges of the court to consider a petition for rehearing of a case originally heard by a division of the court, pointed out that it recognized that certain cases are appropriate ones for consideration by a court in banc. The opinion enumerated certain types of cases which have frequently been treated in this manner.†

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*92 F. Supp. 750.

†I have a somewhat different view of the purport of the opinion in the Western Pacific Railroad Corporation case mentioned above than that which Judge Denman expressed in his dissent in that case. As I understand the majority opinion, it went no further than to hold that a disappointed litigant in the position of the appellant in that case could not, by filing a petition for rehearing in banc, require all the judges of the court to consider and pass upon that petition. I concurred in that opinion because in my mind a contrary holding would mean that the court would, as a practical matter, lose the opportunity which it now has to expedite its disposition of

In my opinion the circumstances make this particular case, in the light of the views expressed by all the members of the court with respect to some of the problems here involved, one in which a hearing in banc should be granted. I think that we, as members of this division which heard the case originally, should recommend a hearing in banc and by our action invite all the judges to participate.

My views in this respect are not based upon the mere fact that I have disagreed with the result reached in the majority opinion here, nor upon my feeling that a grave miscarriage of justice has been given the stamp of approval by this court. Rather my views are based upon the demonstrable probability that were this case heard by all seven judges a different result would be achieved. A study of the views expressed by all seven of the judges in Southern Pacific Company v. Guthrie, 186 F.2d 926 (1951), will disclose why I think it evident that a hearing in banc would produce a different result.

As I have pointed out in my previous dissent in this case, the verdict upon which judgment has been entered here has the vice not merely of being excessive in amount but its validity is tainted by the errors in injecting into the case matters highly prejudicial and calculated to arouse the passion and prejudice of the jury. It is a stronger case than was Guthrie.

The point that I am making is that in any case where the division hearing the matter can say that there is a fair probability

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cases through the hearing of matters before divisions. For instance, in the present case the record fills four printed volumes comprising nearly 2000 pages and I know what a task it was to read that whole record. I do not think the statute intended that I, not a member of the division which heard the Western Pacific case, should have to read all the record in that case, as I might well find necessary in order to vote intelligently upon the petition.

There is language in subdivision (c) of § 46 of Title 28 which would seem to grant to a majority of the circuit judges of the circuit the right to order a hearing or rehearing in banc in any case, a procedure which I am of course not proposing here. That is a question which was not determined by the majority opinion in the Western Pacific case, although Judge Denman seems to think that it was. Upon that question I reserve judgment until such time as determination becomes necessary.

that all seven of the judges would arrive at a different conclusion than that expressed by a mere majority of a division, the case is an appropriate one for a hearing in banc. It is unthinkable to me that a division of the court may lay down a rule or enter a judgment knowing that a majority of the judges who constitute this court would probably disagree. That is this case and for that reason I think that a rehearing should be granted.

(Endorsed:) Per Curiam Opinion and Dissenting Opinion. Pope, C. J. Filed Aug. 27, 1952. Paul P. O'Brien, Clerk.

Due service and receipt of a copy of the within is hereby admitted this ..... day of September, 1952.

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Attorneys for respondents The Western Pacific Railroad Company, et al.

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Attorneys for respondents The Western Realty Co.

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Attorneys for appellants Meredith H. Metzger, et al.